St. Mary's Hospital of Blue Springs *and* Nurses Alliance/Service Employees International Union, AFL–CIO. Case 17–CA–22039

March 31, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On October 16, 2003, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Charging Party (the Union) filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

1. We agree with the judge, essentially for the reasons set out in his decision, that the Respondent complied with its obligation to bargain with the Union over the changes in health coverage for unit employees that it implemented on January 1, 2003. The Respondent's implementation of those changes on that date was permissible even though the parties had not reached an overall impasse, under the authority of *Stone Container*, 313 NLRB 336 (1993), and its progeny.[2] See, e.g., *Saint-Gobain Abrasives*, 343 NLRB 542 (2004).

As the judge found from the credited record, the Respondent gave the Union timely notice of the prospective changes at issue and an opportunity to bargain over them. In addition, the Respondent remained willing to bargain over the changes after implementation. The Respondent also established that the changes were consistent with a past practice, established when the unit's employees were unrepresented, under which the Respondent implemented changes in copremiums, copayments, deductibles, and other terms of health plan coverage on an annual basis.[3] The parties were negotiating for a first contract, but had not reached agreement on health coverage by the time the changes at issue would normally have been implemented. Moreover, if the Respondent did not take any action prior to January 1, the employees would have suffered a disruption in coverage. Under these circumstances, the implementation did not violate Section 8(a)(5) of the Act.[4]

2. We also agree with the judge that Supervisor Dan Hunter did not unlawfully restrict a unit employee's right to engage in protected solicitation when he reprimanded employee Nancy Cunningham, an active union supporter, for telephoning from home another employee, Theren Burlison, to discuss a labor-management issue while Burlison was working at the facility.

As the judge found from the credited evidence, Burlison told Cunningham that he did not want to discuss the subject while he was working, but Cunningham continued to try to keep him on the phone until Burlison finally hung up. When Cunningham called Hunter later the same day on a different matter, Hunter had learned of the incident and told Cunningham "not to call up to the floor and chew out my nurses." This opened a heated exchange during which Hunter responded that "you cannot call and you cannot talk and you cannot call the nurses while I am here and talk about the Union" and that she

[1] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The Board has permitted implementation of a particular proposal, even in the absence of an overall impasse, in circumstances where the proposal concerns a discrete annually occurring event, such as an annually scheduled wage review, that simply happens to occur while contract negotiations are in progress. In *Stone Container*, supra, 313 NLRB 336, the Board found that the employer did not unlawfully refuse to bargain where, during contract negotiations, it told the union, in time to allow for bargaining over the matter, that it was unable to give the annual wage increase because of economic reasons, but the union made no counterproposal and did not raise the issue again during negotiations. In that setting, the Board found that the respondent satisfied its bargaining obligation regarding its failure to grant an annual wage increase.

We do not rely on the judge's statement that "*Stone Container* established the principle that an employer is privileged to bargain to impasse over 'a discrete event . . . that simply happens to occur while contract negotiations are in progress.'" More accurately stated, we reaffirm that, in circumstances like those presented here, involving a discrete event that coincidentally occurs while contract negotiations are in progress, an employer is "not required to refrain from implementing the change [involving a discrete annually recurring event] until an impasse has been reached in bargaining for a collective-bargaining agreement as a whole." *Saint-Gobain Abrasives*, supra.

[3] As a result of an independent corporate acquisition, the administrative service organization (ASO) that administered the Respondent's health plan was replaced by another entity during the relevant time frame. The replacement of the ASO directly resulted in the substitution of a different, but partially overlapping, network of health care providers for unit employees. That additional change was also implemented at the same time that the Respondent implemented its time-recurrent changes in coverage. However, there is no contention that the replacement of the ASO occurred at the Respondent's behest or that it was within its control.

[4] Based on this record, we conclude that the parties, who agreed that time was of the essence due to the January 1, 2003 deadline, had exhausted all possibilities of reaching agreement over the healthcare issue before the deadline. We therefore do not reach the issue of whether the Respondent was required to negotiate to impasse before implementation, because it is unnecessary to the disposition of this case. See *Saint-Gobain Abrasives, Inc.*, supra at fn. 3.

had to limit her union "talk" to outside of the Hospital or during off-duty time in the breakroom. The conversation concluded when Hunter told Cunningham to talk to her lawyer to clarify her solicitation rights in the work place.

We adopt the judge's dismissal because the context in which Hunter reprimanded Cunningham makes clear that his directions to her did not constitute unlawful restrictions on employees to solicit union support in the workplace. Even our dissenting colleague concedes that Cunningham's interruption of Burlison's work was unprotected. Hunter's directions to Cunningham in response to that incident were designed to prevent a repetition of Cunningham's misconduct. By telling Cunningham repeatedly that she could not call employees, Hunter was prohibiting Cunningham from interrupting unit employees' work by contacting them from outside the hospital during their worktime. Such a prohibition was entirely permissible.

Contrary to our dissenting colleague, we do not think that Hunter's admonition would be reasonably understood to prohibit employees from engaging in the kind of union solicitation that is permitted in those work areas which are not immediate patient care areas. Hunter's restrictions were directed at Cunningham specifically. This is demonstrated by Hunter's repeated references to Cunningham's calling employees.[5] Hunter's admonition is reasonably understood in this context. Cunningham was on leave at the time, and thus she contacted Burlison by phone. Absent the restriction, a phone call from outside the hospital could come to a patient care area or be answered by a working employee. Thus, Hunter told Cunningham to limit such activity to off-duty time in the breakroom.

Hunter's comments could not reasonably be interpreted as establishing that he intended to implement a new, more restrictive solicitation policy regarding employees in the hospital. In contrast to Cunningham, those employees could have casual contact with their peers during nonworktimes, or while working in nonpatient care areas.

Similarly, our colleague says that the restriction was not a general one, and was therefore discriminatory against union activity. Again, this ignores the fact that the restriction was tailored to a specific event.

ORDER

The complaint is dismissed.

MEMBER LIEBMAN, dissenting in part.

Contrary to the majority's view, Supervisor Dan Hunter's statements to employee Nancy Cunningham that she could not discuss the Union with other employees "while she was on leave or at any time," and that she could discuss the Union only "outside the Hospital or during off-duty time in the break room," imposed clearly unlawful restrictions on protected concerted activity.[1]

I.

Cunningham made a phone call from her home to employee Theren Burlison to discuss a labor-management matter while he was at work at the Respondent's hospital. Burlison objected to being called on that subject during his worktime and, after Cunningham tried to keep him on the phone, hung up. Hunter learned of the incident, and when Cunningham called him later that day on a different subject, he told Cunningham "not to call up to the floor and chew out my nurses."

During the ensuing conversation, as the judge found, Hunter told Cunningham she could not call employees about union matters "while she was on leave or at any time," and that she could only discuss union matters "either outside of the Hospital or during off-duty time in the break room." When Cunningham retorted that employees had the right to discuss the Union "anywhere" as long as "we weren't impeding patient care or patient safety," Hunter contradicted her and repeated that "you can't talk about it anywhere except the break room or outside of the hospital." Hunter finally stated that "I am your boss and as long as I am your boss, you cannot call and you cannot talk and you cannot call the nurses while I am here and talk about the Union."

II.

Hunter's restrictions clearly violated Section 8(a)(1) in two ways. First, it is well established that employees of a hospital may engage in Section 7 solicitation in any work areas that are not "immediate patient care areas." *Jewish Home for the Elderly*, 343 NLRB 1069, 1076 (2003); *Brockton Hospital*, 333 NLRB 1368–1369 (1999), enfd. in relevant part 294 F.3d 100 (D.C. Cir. 2002), cert. denied 537 U.S. 1105 (2003). Hunter's restrictions categorically barred Cunningham—and by implication all unit employees—from engaging in Section 7 solicitation anywhere in the hospital except in the breakroom. That prohibition was unlawful. Contrary to the majority, it cannot be justified by the mere possibility that a union-related call from outside "could come to a patient-care area."

[5] Our colleague does not say the contrary. She says only that "by implication," the restriction applied to all. Since Hunter was speaking only in response to Cunningham's activity, we do not believe that any such implication has been shown.

[1] I agree with the majority that the Respondent's implementation of the changes in unit employees' health coverage at issue here was not unlawful.

Second, even accepting the majority's characterization of Hunter's statements as only a prohibition on worktime conversation, such a prohibition would only be lawful as part of a nondiscriminatory ban on *all* nonwork conversation. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 fn. 10 (1945), citing *Peyton Packing*, 49 NLRB 828, 844 (1943); *Opryland Hotel*, 323 NLRB 723, 729 (1997). Absent such a general ban, an employer's restriction on protected activity cannot be justified by the mere fact that the activity occurred during worktime. *Selwyn Shoe Mfg. Co.*, 172 NLRB 674, 676 (1968), enf. denied. on other grounds 428 F.2d 217 (8th Cir. 1970). Because the Respondent has not contended that it maintained a general ban, Hunter's statement was unlawful. See, e.g., *Nicholas County Health Care Center*, 331 NLRB 970, 986 (2000).

The majority emphasizes that Cunningham not only talked to Burlison during his worktime, but also clearly interrupted his work, by attempting to extend their conversation over his objections. An employer may indeed restrict activity that actually interrupts production, and to this extent the credited evidence indicates that Cunningham's efforts were unprotected. However, Hunter's statements to Cunningham in their subsequent conversation went well beyond reprimanding her for that misconduct regardless of whether, as the majority asserts, those statements were "directed" solely at Cunningham's action or were "designed" solely to prevent Cunningham from repeating it. Hunter's prohibitions contained no such terms of limitation and would quite reasonably be taken at face value. They were therefore unlawful.[2]

Lyn Buckley, Esq., for the General Counsel
Robert J. Janowitz, Esq., Paul D. Satterwhite, Esq., and *Kerri S. Reisdorff, Esq. (Constangy, Brooks & Smith, LLC),* of Kansas City, Missouri, for the Respondent.
Brian P. Wood, Esq. (Wickham & Wood, LLC), of Kansas City, Missouri, and *Walter R. Roher, Esq., of* Blue Springs, Missouri, for the Union.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice a hearing in this matter was held before me in Overland Park, Kansas, on June 10, 11, and 12 and August 13 and 14, 2003.. The charge in the captioned matter was filed by Nurses Alliance/Service Employees International Union, AFL–CIO (the Union) on January 9, 2003. Thereafter, on March 26, 2003, the Regional Director for Region 17 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging violations by St. Mary's Hospital of Blue Springs (Respondent or Hospital) of Section 8(a)(5) of the National Labor Relations Act (the Act). The Union filed an amended charge on March 24, 2003, and thereafter, on May 27, 2003, the Acting Regional Director issued an amended complaint and notice of hearing alleging violations of Section 8(a)(1) and (5) of the Act. The Respondent, in its answers to the complaint and amended complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (the General Counsel), counsel for the Respondent, and counsel for the Union. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation with an office and place of business in Blue Springs, Missouri, where it is engaged in the operation of an acute care hospital in Blue Springs, Missouri. In the course and conduct of its business operations the Respondent annually derives gross revenues in excess of $250,000, and annually purchases and receives goods and materials valued in excess of $50,000 which originate outside the State of Missouri. It is admitted and I find that the Respondent is, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The parties stipulated, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The principal issues in this proceeding are whether the Respondent has violated Section 8(a)(1) of the Act by restricting employees from discussing the Union during working hours, and whether the Respondent has violated Section 8(a)(1) and (5) of the Act by fait accompli bargaining.

B. Facts

1. The 8(a)(5) allegation

On February 8, 2002,[1] the Union was certified by the Board as the collective-bargaining representative of Respondent's registered nurses, numbering approximately 250 employees. The parties commenced collective-bargaining negotiations in May. It was agreed that noneconomic matters would be discussed first, and that economic matters would be discussed during a later stage of the negotiations.

The Respondent is one hospital under an umbrella organization, Carondelet Health. Carondelet Health is parent organiza-

[2] Hunter's statements cannot be considered de minimis, as the judge found, even if they comprised only a single occurrence and no similar prohibitions were communicated or enforced. See *Golub Corp.*, 338 NLRB 515, 517 (2002).

[1] All dates or time periods herein are within the year 2002, unless otherwise indicated.

tion to two hospitals and apparently other medical facilities, including the Respondent, with at total employee complement of approximately 3000 individuals, including managerial employees. Carondelet Health has always treated all these employees as a single group for purposes of its self-funded health, dental, and vision insurance (insurance program). A trust, established by Carondelet Health, called Carondelet Health and Affiliates Employees Health Care Fund (Health Care Fund), annually evaluates and determines the "plan design" or the parameters of its insurance program, and in approximately November of each year all the employees are given notice of any changes in plan design, premiums, deductibles or copays that will become effective on January 1 of the following year. During the period between November and December 31 of each year, all employees are given the opportunity to enroll in, or change, or modify insurance coverage for the succeeding year. Carondelet Health has operated this self-funded insurance program in the same manner for the past 16 years.

On Monday, November 4, Robert Janowitz, the chief negotiator for the Respondent was advised by Donna Sumner, head of the Carondelet Health benefits program, that the trustees of the health care fund had approved the plan design and fee changes for the new plan year effective January 1, 2003. Upon receiving this information, Janowitz immediately phoned Walter (Bud) Roher, the Union's chief negotiator, and then sent Roher the following email:

> Bud, this e-mail is a follow up to the voice-mail messages I have left on your cell phone and office phone earlier this morning. I am faxing to you a copy of Carondelet's e-mail "Question and Answer" document that is planned for delivery to all system employees asap. I'm told it is very difficult to separate out the bargaining unit at SMHBS [St. Mary's Hospital of Blue Springs] so the bargaining unit employees would be among the recipients. SMHBS recognizes that the health insurance changes are mandatory subjects of bargaining. The plan design changes that are being considered would take effect on January 1, 2003. Given the time-line, I would like to schedule special meetings on the insurance issues between November 12 and the end of the year. If I am not available after Dec. 1, due to NLRB hearing conflicts, my partner Steve Schuster will pinch hit for me. I will be faxing you the specific plan design changes Carondelet is considering as soon as I receive them. This should be later today or tomorrow.

The Respondent and the Union agreed that time was of the essence due to the January 1, 2003 deadline, and that negotiations over healthcare would supercede any other contract matters. Therefore, all ensuing bargaining negotiations would be focused on healthcare issues until that matter had been negotiated.

Thereafter, there were a number of negotiating sessions. While lengthy record evidence reflects the dynamics of each negotiating session in specific detail, it seems unnecessary to recount these details here, as the Union has admitted that during the 2-month period between early November and January 1, 2003, it was provided whatever information it requested regarding health insurance issues;[2] that the Union and individual nurses within the bargaining unit who attended the negotiations were given the opportunity to ask questions of Carondelet Health representatives, health care fund trustees, and health care plan administrators, infra, and that the Union was provided with a sufficient opportunity to bargain and present the proposals it wanted to present. Indeed, there were other negotiating sessions scheduled for the end of the year, and the Union canceled these negotiations believing that further bargaining over the matter at that time would be unproductive. Accordingly, it appears that a summary of the bargaining negotiations is sufficient for purposes of this decision.

Further, the record evidence shows and I find that the Respondent gave advance notice and received permission from the Union to send the unit employees the same information it sent to all of its other 2750 employees. It was the agreed-upon intent of both the Respondent and Union that, in the event the parties were unable to reach some other resolution of the matter, unit employees be given the opportunity to enroll in the plan or modify their existing benefits in a timely manner, as employees had done for the past 16 years, and not be placed in the position of being without health insurance after the January 1, 2003 deadline.[3]

Janowitz testified that one of the initial proposals the Respondent made after bargaining commenced in May was a proposal regarding "applicability of personnel policies." This proposal set out the Respondent's position "that it wanted very much to maintain and continue as many of its existing pollicies and procedures as it could. And it was stated by me that if the Union wanted us to change our existing policies, it was the Union's burden to convince us to do so."

Bargaining over health insurance commenced on November 12. The Union's chief negotiator, Roher, testified that at that bargaining session the Respondent's chief negotiator, Janowitz, stated, "We don't intend to treat our bargaining unit employees any different than the rest of the Carondelet employees." However, Roher also testified as follows:

> Q. (by Janowitz) All right. And do you remember any discussion regarding my acknowledgment that while this was now the Hospital's initial proposal, the Hospital certainly understood that it had a bargaining obligation, and was willing to bargain over it.
>
> A. Yes.
>
> Q. And then I told you, that consistent with our initial proposal, we are very interested in having everyone in . . . Carondelet Health, in the same plan.
>
> A. Yes.

Janowitz testified that at this meeting he referred to the Respondent's earlier "applicability of personnel policies" pro-

[2] The information, introduced into evidence, is voluminous, and consists of many hundreds of pages. In fact, Schuster advised Roher that the copying costs for the information were substantial, and requested that the Union reimburse the Respondent for such costs. Roher objected, and considered this to be an economic issue, which would be discussed at an appropriate time in the future.

[3] Approximately 132 of the 250 unit employees were enrolled in the health insurance program.

posal, and advised Roher and the union bargaining committee that Respondent had historically treated all Carondelet Health employees the same for insurance benefit purposes; therefore the Respondent was proposing to continue that practice and treat the bargaining unit employees in the same fashion. The Union made no proposals during this meeting.

The next negotiating session was held on November 21. There was further discussion, but no proposals from either party. Thus, the Union had not yet presented any proposal of its own.

In the absence of Attorney Janowitz, the Respondent was represented by Steven Schuster during the next two meetings on December 5 and 10. During both bargaining sessions, Schuster repeated several times that the Respondent was willing to negotiate and recognized that the health plan was a subject of negotiations.

During the December 5 bargaining session, the Respondent introduced Jan Stahlmeyer, president and chief administrative officer of Coventry Healthcare of Kansas (Coventry). Coventry, an administrative service organization (ASO), had recently purchased or acquired Healthnet, the previous ASO for Carondelet Health. Carondelet Health was not involved in this transaction. Stahlmeyer explained to the Union that beginning January 1, 2003, Healthnet would no longer be in business and Coventry would become the ASO for Carondelet Health's insurance program. Stahlmeyer stated that Coventry had its own "network" or provider list of physicians that was larger than the former Healthnet network, and said that Coventry was doing everything it could to attract and contract with former Healthnet physicians. In this regard, the Union was given physician request forms for unit employees to submit to Coventry so that Coventry, in turn, could contact the physicians and attempt to include them in the Coventry network. Stahlmeyer also talked about the transition from Healthnet to Coventry for employees who might have to change doctors.[4]

Stahlmeyer was also asked by Roher whether Coventry would consider becoming the ASO for a separate and distinct group of unit employees. Stahlmeyer said yes.

Roher asked whether the Respondent had previously considered carving out the registered nurses as a separate group. Both Schuster and Gary Clifton, executive vice president/chief financial officer of the Respondent or affiliated entities, and an officer of the Respondent as well as a trustee of the healthcare fund, said no, that this had not been considered and that the Carondelet Health employees had always been included in the same plan and it was the intent to maintain that. Roher asked if the Respondent was willing to negotiate over carving out the unit employees as a separate group. Schuster said the Respondent would entertain a counterproposal if one were presented.

[4] In certain specific situations, such as chronic illness, there would be a 90-day period beyond January 1, 2003, during which employees could utilize their current physician even though that physician was not a provider under the Coventry network. Stahlmeyer said there were 3600 physicians in the Coventry network and that Coventry believed there were approximately 350 former Healthnet physicians who had not yet signed an agreement with Coventry. The Respondent furnished the Union with a list of former Healthnet physicians who had already agreed to provide services under the Coventry network.

Then, during that same December 5 session, the Union presented the Respondent with its initial healthcare proposal, as follows:

> The status quo shall remain in effect for all Health, dental and Vision plans, with respect to premiums, co-pays, deductibles, and service provider lists during the pendency of the negotiations. The SEIU, Nurse Alliance reserves the right to make proposals different than this during the economic negotiations.

Schuster stated the Respondent would consider the proposal and respond to it at the next bargaining session.

During the interim period between bargaining sessions, the Respondent explored an alternative proposal, namely, determining an amount of money to offer the Union so that the Union could obtain its own health insurance. Respondent's representatives met with an outside consultant employed by an independent consulting firm, the same firm utilized by Carondelet Health. Schuster testified as follows regarding this meeting:

> It was a rather lengthy meeting because, quite frankly, we were going over all sorts of information, talking about issues such as utilization, talking about administrative costs associated with health insurance, talking about stop loss coverage that would be necessary for protection of extraordinarily high claims because, again, we were wanting to put a meaningful proposal to the union and one that was based on input from [the consultant] recognizing that it may be one seriously considered.
>
> . . . .
>
> We concluded the meeting with a specific figure of $525,000.00, as the amount we would make available to the union and, again, that figure was arrived at, as we looked at the projected utilization for the Registered Nurses based on the information we had provided, the ASO fee that Coventry would charge a group of that size, administrative costs associated with managing a plan of that type, such as processing claims.
>
> We also, added onto that the cost for the stop loss, which was a figure [the consultant] had provided us, as being reasonable for a group of that size. Then, we also incorporated into that $525,000.00, the actual cost of the dental insurance premiums that were paid by the bargaining unit Registered Nurses.

At the December 10 bargaining session, the Respondent presented the Union with the following counter proposal:

> SMHBS [St. Mary's Hospital of Blue Springs] registered nurses will be eligible to enroll in health, dental and vision insurance plans on the same terms and conditions as all other Carondelet Health (CH) employees. SMHBS will be subject to the same premiums, co-pays, deductibles and service provider list as all other CH employees as of January 1, 2003. The SEIU, Nurse Alliance, reserves the right to make proposals and engage in negotiations for other terms during the pending negotiations between the parties.

Schuster then told Roher and the Union's bargaining committee that the Respondent had an alternative proposal, and

proceeded to advise the Union that the Respondent would make $525,000 available to the Union to go out in the open market and obtain other insurance, including insurance through the SEIU. He then explained how the Respondent had formulated this proposal. Roher expressed surprise that the Respondent was coming up with such an alternative proposal at that time. Schuster responded that until December 5 when the Union presented its first proposal, the Respondent "had no indications whatsoever" that the Union was not moving in the direction of accepting the Respondent's original proposal, and until that time the Respondent was optimistic or at least hopeful the Union would agree.[5] Roher stated that the Union wanted to maintain the status quo, but that the Union would have an interest in the Respondent's alternative proposal. He asked whether Schuster would put this in writing. Schuster said he would.[6] Regarding this, Schuster testified as follows:

> We then got into a general discussion about the union's reaction to the verbal proposal of $525,000.00 and Mr. Roher indicated that they were interested but were not prepared to discuss it at that time and, in fact, indicated that the union considered the proposal tabled because they would not talk about it, as considering it an economic tern and condition. They basically said we are done discussing this issue, until economics come up. Let us move on.

Schuster then asked if Roher was telling him that the Union was refusing to talk further about health insurance until the parties began bargaining about economic issues. Roher, according to Schuster, said yes. Then the Union presented Schuster with proposals on other unrelated contract matters. Schuster advised Roher that he was there for the specific purpose of discussing health insurance, and that matters other than health insurance could be continued when Janowitz returned to the bargaining table for the Respondent as Schuster had not been involved became in those discussions. Roher objected to this and, according to Schuster, became rather loud and insulting. Schuster and his committee said they were not going to continue, and as far as they were concerned the session was over.

Schuster and Roher had a discussion in the hallway. Schuster said that given the Union's position on health insurance, namely that the Union was not going to discuss it further until the parties got into discussions on economics, he did not see that anything more could be accomplished. Schuster advised Roher that absent an agreement on health insurance, the Respondent intended to convert the bargaining unit registered nurses to the Carondelet Health insurance plan as of January 1, 2003, on the same terms and conditions as other Carondelet Health employees. Schuster asked Roher to convey this to the committee. Roher said no, that Schuster could tell them. Schuster did so.

The next bargaining session was scheduled for December 20. The Union failed to show up for this meeting. The next scheduled session was for December 22. The Union was to advise the Respondent of the time and place for this meeting and did not do so. This meeting was not held.

On December 26, Roher sent a letter Janowitz advising that the Union had arranged for a meeting on Monday, December 30. The letter also contained the following counterproposal:

> The current level of premiums, deductibles, and copays shall remain in effect without change on January 1, 2003 with respect to the health, dental and vision insurance. The nurses will agree to the new provider lists for health, dental and vision the hospital proposes to change to on January 1, 2003.

The parties met on December 30. Janowitz said that while he appreciated the Union's accepting the new provider lists, the Union's proposal was regressive in that it seemed to require that the Respondent continue the former health insurance plan, with no increase in premiums, deductibles, or copays for the life of the agreement, and left no room for further negotiations regarding health insurance during the contract term. Therefore, the Respondent was rejecting the proposal. No further progress was made. As announced, the Respondent implemented its proposal and the bargaining unit registered nurses were included in the Carondelet Health insurance plan on January 1, 2003.

Since December 30, there have been many bargaining sessions over other contract matters; however health insurance has not been discussed. Bargaining over health insurance has not been foreclosed by the implementation of the health care plan. Thus, the Respondent has not withdrawn its proposal permitting the Union to request further bargaining about this matter at any time; nor has the Respondent withdrawn its alternative proposal to provide $525,000 to the Union so that the Union may obtain its own health insurance plan for the registered nurses. As of the final date of the hearing herein, August 14, 2003, the parties have not begun discussing economic issues.

2. The 8(a)(1) allegation

The complaint alleges that in about late January 2003, a supervisor "instructed employees that they cannot discuss the Union with other employees at the Hospital."

Nancy Cunningham, a registered nurse and an active union adherent, had been elected as a union representative for her floor. She had sustained an on-the-job injury and was at home when she called her supervisor, Dan Hunter, at the Hospital and asked if he could find some light-duty work for her. Cunningham testified that during the conversation, Hunter said, "Oh, by the way, since I have got you on the phone, I want to tell you, not to call up to the floor and chew out my nurses." Cunningham denied that she did this, and Hunter insisted that she had done this. Then Hunter told her that she was not to call up on the floor and talk to anybody about union matters or anything pertaining to the Union while she was on leave or at any time.

[5] Schuster testified that on about December 3 he had just successfully concluded negotiations with another union, the Operating Engineers at St. Joseph's Medical Center, another hospital under Carondelet Health. The Operating Engineers did accept the same healthcare plan as was being proposed to the Union, with a contract provision permitting the Operating Engineers to opt out of the plan if costs increased during the term of the contract, in which case the Operating Engineers could implement its own plan. This contract language had also been included in the prior collective-bargaining agreement between the parties.

[6] Schuster did put this in writing in a letter dated December 13.

Cunningham told him she had the right to do this and that the nurse she had called had given her permission to speak with him at that time. Hunter told her the only place to talk about union matters would be either outside of the Hospital or during off-duty time in the breakroom. Cunningham said, "Well, actually, we do have the legal right now that we have unionized to speak about it anywhere that we would speak about anything else, as long as we . . . weren't impeding patient care or patient safety." Hunter said no, and reiterated that "you can't talk about it anywhere except the break room or outside of the hospital."

According to Cunningham, the two "went back and forth," with "yes I can" and "no you can't" retorts. Hunter then said, "Well, I am your boss and as long as I am your boss, you cannot call and you cannot talk and you cannot call the nurses while I am here and talk about the Union." Again Cunningham said that although Hunter was her boss, "I must inform you that we can talk about the Union." Hunter then said, "Well, you need to call your lawyer." Cunningham said that she would do so and while he was talking to her she hung up on him. Then she immediately called "my lawyer," apparently meaning the Union's lawyer.

Theren Burlison is a registered nurse in the bargaining unit. Burlison testified that he was on duty wen he received a phone call from Cunningham. This interrupted his work. Cunningham did not ask if he had time to talk with her, and she went on to advise Burlison that she and some of the other nurses were going to boycott a training class conducted by another nurse because that other nurse "had said something that was unfavorable to the Union." Burlison said he didn't know what she was talking about and that he really didn't have time to talk with her as he was trying to enter data on the computer regarding a patient's admission to the hospital. Cunningham said, "Well, you know, we are all trying to be united as nurses here; you do want to be united, don't you?' Burlison said he was busy and really didn't have time to talk, and Cunningham just kept talking as if Burlison had not said anything. He repeated that he didn't have time to talk, and said, "This conversation is over." Then he slammed down the receiver. His charge nurse happened to be nearby, and Burlison said to her, "I don't think I have to put up with this shit while I am at work." The charge nurse advised Hunter of what had happened.

I credit Burlison's testimony and do not credit the testimony of Cunningham insofar as it is inconsistent with Burlison's testimony.

Hunter did not testify in this proceeding.

C. Analysis and Conclusions

It is the position of the General Counsel and the Union that the Respondent was simply going through the motions of bargaining, but had approached bargaining with a predetermined intent to implement its new insurance program vis-à-vis the unit employees, including increased premiums, deductibles and copays, without making a good-faith effort toward any type of compromise. Accordingly, having presented the Union with such a "fait accompli," the Union came to the realization that further bargaining would have been futile.

There is no requirement that an employer delay its decision-making process until after bargaining with a union over a mandatory subject of bargaining. Rather, after making its decision, an employer is required to delay implementation of that decision until the employer has fulfilled its bargaining obligation. *Hasson Craftsmen, Inc.*, 300 NLRB 789 fn. 8 (1990). As the Board stated in Hasson, at page 790:

> The Board has found that it is not unlawful for an employer to present a proposed change in terms and conditions of employment as a fully developed plan or to use positive language to describe it. [Footnote omitted.]

Here the Respondent acknowledged its bargaining obligation, gave timely notice to the Union of its intent to continue to treat bargaining unit and nonbargaining unit employees the same unless the Union could convince the Respondent that it should not do so, and did not implement its proposal until after the Union determined that further bargaining would not be productive. Moreover, during the course of negotiations, the Respondent was not inflexible. It adopted a proposal of the Union that permitted the Union to raise the matter of health insurance at any time during the future course of negotiations, and presented the Union with an alternative proposal that would permit it to obtain other health insurance.

In this regard, there is no indication that the Respondent's $525,000 insurance proposal was not presented in good faith as a viable alternative proposal. Rather, it appears that the Union simply was not interested in it at that time. The General Counsel and the Union maintain that the Union was not given sufficient time to investigate this alternative proposal. I do not agree. There is no evidence showing that the Union ever actively attempted to investigate the possibility of alternative insurance. Nor did the Union request that the Respondent delay implementation of its own insurance plan in order to give the Union time to explore the possibility of alternative insurance. Further, the Union has not raised this issue during the subsequent course of bargaining. Indeed, upon being presented with this alternative proposal, Roher stated, according to the testimony of Schuster, whom I credit, that the Union was interested but considered the proposal tabled until later in the negotiations when economic issues were to be negotiated.

From the foregoing, I find that the record evidence does not support the complaint allegation that the Respondent presented the Union with a fait accompli and therefore that the subsequent bargaining was not in good faith.

While the complaint contains no such specific allegation, the General Counsel and Union also take the position that as a matter of law the Respondent was precluded from putting its healthcare plan into effect until after an impasse was reached on the entire contract, not merely on the healthcare issues. See *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995*); Bottom Line Enterprises*, 302 NLRB 373 (1991). The Respondent has expressly relied upon the Board's decisions in *Stone Container Corp.*, 313 NLRB 336 (1993), and *Brannan Sand & Gravel*, 314 NLRB 282 (1994), for the proposition that it was privileged to bargain to impasse over health insurance alone, during the course of negotiations.

Stone Container established the principle that an employer is privileged to bargain to impasse over "a discrete event, such as an annually scheduled wage review . . . that simply happens to

occur while contract negotiations are in progress." Thus, in *Brannan Sand & Gravel*, the Board states:

> The health plan changes at issue here are similar to the annual wages increases involved in *Stone Container* because the record shows that since the inception of the health care plan, its costs and benefits have been reviewed and adjusted annually to control the Respondent's expenditures. Therefore, in accordance with *Stone Container*, we find, contrary to the Judge, that the Respondent was not obligated to refrain from implementing its proposed changes until an impasse was reached on collective-bargaining negotiations as a whole.

In this regard, the General Counsel and Union argue that the precedent established by *Stone Container* and *Brannan Sand & Gravel* is not currently followed by the Board or, in the alternative, that the Board should overturn these decisions because piecemeal bargaining has an inhibiting effect on overall contract negotiations and a demoralizing effect on recently-certified unit employees. Regarding this argument, it appears that the Union and the General Counsel are raising policy considerations that should be addressed to the Board.[7] Regarding the argument that the Board no longer seems to follow these decisions, the General Counsel cites, principally, *Maple Grove Health Care Center,* 330 NLRB 775 (2000). In *Maple Grove Health Center* the Board reiterates the general rule that, with two exceptions, an employer may not bargain to impasse on a piecemeal basis: namely, when the union engages in tactics designed to delay bargaining, or when economic exigencies compel prompt action by the employer. Accordingly, the General Counsel and the Union read this language as tacitly overturning *Stone Container* and *Brannan Sand & Gravel* as these cases present a *third* exception to the general rule. See also *Mackie Automotive Systems*, 336 NLRB 347 (2001); *RBE Electronics of S.D., Inc.,* supra.

I find this argument to be without merit. The Board in *Maple Grove Health Center*, *Mackie Automotive*, and *RBE Electronics* was simply not confronted with a *Stone Container* issue and therefore its omission of the *Stone Container* principle may not be given the overriding significance suggested by the General Counsel. Further, the Boards' Office of the General Counsel, in a report on recent case developments dated November 8, 2002, under the heading of "Changing Health Insurance Plans," specifically determined not to issue a complaint in a case because of the *Brannan Sand & Gravel* exception to the general rule. Clearly, the Office of the General Counsel believes that the *Brannan Sand & Gravel* exception to the general rule continues to be a viable principle of Board law.

The Union contends in its brief that the health care changes implemented by the Respondent do not fall within the discrete event exception. Rather, according to the Union, the changes constitute a complete revamping of the Respondent's health care program[8] because the Respondent not only made changes to the premiums, deductibles, and copays, but also changed its administrative service organization from Healthnet to Coventry; this latter change further resulted in a different network of physicians or health care providers than had previously provided services to the unit employees.[9] Regarding changes to the ASO and its contracts with various providers, this decision was not made by the Respondent; rather, as noted above, this change occurred as a result of eventualities beyond the Respondent's control. Further, the record shows that the Respondent has had an annual practice of evaluating its "plan design." While the record does not specifically note the various components of a plan design, it may be assumed that this language would include the evaluation and changing of all components of the Respondent's insurance program, including its ASO and, as a result, the provider network. There is no record evidence to the contrary. Accordingly, I find this argument of the Union to be without merit.

On the basis of the foregoing, I shall dismiss the 8(a)(5) allegation of the complaint.

Regarding Hunter's conversation with Cunningham, there was a clear difference of opinion about the rules regarding union discussion during working hours. Cunningham was an active union representative and Hunter knew this. Cunningham forcefully told Hunter what her "legal rights" were and Hunter forcefully disagreed. Then, after they seemed to be at an impasse over the matter, Hunter told her to call her lawyer. Clearly, Cunningham was not intimidated by Hunter as she hung up on him. Also, intermingled with this difference of opinion was Hunter's pique at Cunningham's clearly inappropriate behavior in bothering another on-duty nurse who, I have found, had indicated to Cunningham that he was busy and did not want to be harassed about union matters. There is no evidence that at any time before or after this conversation either Cunningham or any other nurse has been prohibited from engaging in permissible union activity.

On the basis of the foregoing, I shall dismiss this allegation of the complaint. Hunter believed that he was right, and Cunningham believed that she was right. Hunter did not threaten to take any disciplinary action against Cunningham, but merely told her to call her lawyer. There is no showing that this conversation resulted in any adverse action against Cunningham, even though Cunningham hung up on Hunter. Regardless of who was correct regarding the parameters of the work rules, this one isolated difference of opinion, occurring nearly a year after the Union had been certified as the collective-bargaining representative of some 250 registered nurses, is clearly de minimus.

Accordingly, I shall dismiss the complaint in its entirety.

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[7] Even if the Board were to overturn these decisions, it would clearly be inappropriate to do so retroactively, as the Respondent specifically relied upon these decisions to formulate its bargaining strategy.

[8] The Union did not make this argument during the hearing, and therefore the Respondent did not have an opportunity to rebut it.

[9] During the course of bargaining the Union agreed to Coventry's list of health care providers, and there is no showing that any physicians utilized by the unit employees were not included in Coventry's network.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law, I issue the following recommended[10]

ORDER

The complaint is dismissed in its entirety.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.